Supreme Court, U.S.
FILED
APR 13 1998
CLERK

No. 97-5737

In the Supreme Court of the United States

OCTOBER TERM, 1997

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT IN SUPPORT OF REVERSAL

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
1. The district court's order remanding the cause to the Commissioner is a final judgment for purpose of appeal under 42 U.S.C. 405(g) and 28 U.S.C. 1291	2
2. Petitioner is aggrieved by the district court's judgment	4
3. Petitioner does not merely challenge statements in the district court's opinion that are unnecessary to its judgment	14
4. The policy considerations advanced by amicus do not warrant an implied exception to the statutory right of appeal	17

TABLE OF AUTHORITIES

Cases:	Page
Allstate Ins. Co. v. *A.A. McNamara & Sons, Inc.*, 1 F.3d 133 (2d Cir. 1993)	15
Baker v. *General Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), rev'd on other grounds, 118 S. Ct. 657 (1998)	12
Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 (1955)	18
Bohms v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968)	3
California v. *Rooney*, 483 U.S. 307 (1987)	15
Chan v. *Korean Air Lines Ltd.*, 490 U.S. 122 (1989)	10
CH2M Hill Central, Inc. v. *Herman*, 131 F.3d 1244 (7th Cir. 1997)	13
DES Litig., In re, 7 F.3d 20 (2d Cir. 1993)	15
Deposit Guaranty Nat'l Bank v. *Roper*, 445 U.S. 326 (1980)	5, 10, 13, 18
Director, OWCP v. *Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1988)	13

Cases—Continued: Page

Electrical Fittings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241 (1939) 10
Faucher v. *Secretary of Health and Human Servs.*, 17 F.3d 171 (6th Cir. 1994) 6
Fort Wayne Books, Inc. v. *Indiana*, 489 U.S. 46 (1989) 11
Jefferson v. *City of Tarrant*, 118 S. Ct. 481 (1997) .. 12
McCarthy v. *Madigan*, 503 U.S. 140 (1992) 18
Melkonyan v. *Sullivan*, 501 U.S. 89 (1991) 8
Nguyen v. *Shalala*, 43 F.3d 1400 (10th Cir. 1994) ... 18
O'Connor v. *Shalala*, 23 F.3d 1232 (7th Cir. 1994) .. 17
Owen-Illinois, Inc. v. *Aetna Cas. & Sur. Co.*, 990 F.2d 865 (6th Cir. 1993) 15
Parr v. *United States*, 351 U.S. 513 (1956) 11, 12, 13
Ricke v. *Armco, Inc.*, 92 F.3d 720 (8th Cir. 1996) ... 10
Shalala v. *Schaefer*, 509 U.S. 292 (1993) 2, 3, 4, 8
Southern Natural Gas Co. v. *FERC*, 877 F.2d 1066 (D.C. Cir. 1989) 6
Star Fin. Servs., Inc. v. *AASTAR Mortgage Corp.*, 89 F.3d 5 (1st Cir. 1996) 7
Steel Co. v. *Citizens for Better Environment*, 118 S. Ct. 1003 (1998) 14
Stripe-A-Zone v. *Occupational Safety and Health & Review Comm'rs*, 643 F.2d 230 (5th Cir. 1981) 13
Sullivan v. *Finkelstein*, 496 U.S. 617 (1990) 2, 3, 4, 8, 9, 12, 18
United States v. *Jose*, 117 S. Ct. 463 (1996) 3, 5, 9, 13
United States v. *Ligori*, 658 F.2d 130 (3d Cir. 1981) 7
United States v. *MacDonald*, 435 U.S. 850 (1978) .. 11
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 12
Yarn Processing Patent Validity Litig., In re, 530 F.2d 83 (5th Cir. 1976) 7

Constitution, statutes and rule: Page

U.S. Const. Amend. VI 11
Administrative Procedure Act, 5 U.S.C. 704 13
Social Security Act, 42 U.S.C. 405(g) ..... *passim*
15 U.S.C. 717r(b) 6
28 U.S.C. 1257(a) 12
28 U.S.C. 1291 ..... 2, 10, 12, 18
28 U.S.C. 1292(a)(1) 10
28 U.S.C. 1292(b) 10
29 U.S.C. 659(c) 13
29 U.S.C. 660(a) 13
33 U.S.C. 921(c) 13
Fed. R. Civ. P. 8(a) 5

Miscellaneous:

C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*:
Vol. 15A (2d ed. 1992) 13
Vol. 16 (2d ed. 1996) 10

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-5737

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER
OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT IN SUPPORT OF REVERSAL

As we set forth in our opening brief, the district court in this case, pursuant to sentences four and eight of 42 U.S.C. 405(g), entered a final judgment reversing the Commissioner's decision denying petitioner's application for disability benefits, and remanding the cause to the Commissioner for further administrative proceedings on the merits. Although the district court's decision is favorable to petitioner to that extent, petitioner sought greater relief in the form of an outright reversal—a judgment affirmatively finding her entitled to disability benefits, not merely remanding for a rehearing by the Commissioner. That greater form of relief is expressly authorized by the fourth sentence of Section 405(g). Because the district court's decision did not grant

petitioner all of the relief she requested, petitioner is aggrieved by the judgment and may appeal it. Accordingly, the court of appeals erred in dismissing petitioner's appeal for lack of jurisdiction.

The amicus curiae appointed by this Court advances three main arguments in support of the court of appeals' judgment. First, amicus contends that petitioner is not aggrieved by the district court's decision because it affords her part of the relief she requested and does not prevent her from ultimately obtaining benefits. Second, amicus claims that petitioner does not seek to alter the district court's judgment of remand for further proceedings, but seeks solely to correct erroneous statements in the district court's decision that were unnecessary to the court's judgment. Third, amicus argues that policy reasons warrant denial to petitioner of a statutory right of appeal under 28 U.S.C. 1291. Each of those contentions lacks merit, as does petitioner's passing suggestion at the outset that the district court's decision is not a final judgment.

1. The District Court's Order Remanding The Cause To The Commissioner Is A Final Judgment For Purpose Of Appeal Under 42 U.S.C. 405(g) And 28 U.S.C. 1291

Amicus does not seriously dispute that, under the text of Section 405(g) and under this Court's decisions in *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), the court of appeals correctly concluded that the district court's judgment is a "final decision[]" over which "[t]he court[] of appeals * * * shall have jurisdiction." 28 U.S.C. 1291. Nor does amicus dispute that a substantial anomaly would result if this Court were to hold that Section 405(g)'s fourth sentence "directs

the entry of a final, appealable judgment" (*Finkelstein*, 498 U.S. at 629) only with respect to the Commissioner. See *United States* v. *Jose*, 117 S. Ct. 463, 465 (1996) ("appellate jurisdiction over final decisions does not turn on which side prevailed in the District Court").

Instead, amicus questions in a footnote (Br. 10 n.7) whether Congress intended to limit the finality of remand orders to the particular situation presented in *Finkelstein*, in which an agency, which might otherwise be precluded from appellate review, seeks to appeal a district court judgment containing a remand order. Accordingly, amicus contends (*id.* at 11 n.7) that because "there is no compelling practical reason to treat the type of remand order here as final," the Court should apply what amicus asserts is the general rule outside the Social Security context: that remands to an agency are not immediately appealable.[1]

As we explain in our opening brief (Br. 11-16), however, the Court in *Finkelstein* neither limited its reasoning to circumstances in which the government could demonstrate a practical need to appeal nor relied on the "collateral order" theory advanced in the alternative by the government, which would more evidently have afforded a right of appeal only to the

---

[1] In arguing that remands to administrative agencies are interlocutory, amicus cites (Br. 11 n.7) *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968). As we note in our opening brief (Br. 12 n.7), however, the remand at issue in that case was entered pursuant to sentence six and, therefore, was not a judgment made final by the eighth sentence of Section 405(g). See *Schaefer*, 509 U.S. at 297 ("a sentence-four judgment * * * is the *only* judgment authorized by § 405(g)").

Commissioner. To the contrary, the Court found that the express text of the fourth and eighth sentences of Section 405(g) categorically provides that the district court's action under sentence four "*terminate[s]*" the litigation before the court and must result in "the entry of a *final, appealable* judgment even though that judgment may be accompanied by a remand order." 496 U.S. at 625, 629 (emphases added); see also *id.* at 627 (rejecting the argument that the eighth sentence of Section 405(g) "does not compel the conclusion that a judgment entered pursuant to the fourth sentence is immediately appealable"). Since *Finkelstein*, this Court has reiterated without qualification the conclusion that the "plain language" of sentence four directs the entry of a final, appealable judgment. See *Schaefer*, 509 U.S. at 297.

2. Petitioner Is Aggrieved By The District Court's Judgment

Amicus argues that, even if the district court's judgment of remand is final, petitioner may not appeal because she is not aggrieved by the judgment. Amicus reasons, as did the court of appeals (see Pet. App. 10), that the district court's judgment remanding for further proceedings is favorable to petitioner because it provides her with the opportunity on remand to obtain disability benefits. Amicus improperly imports matters involving future proceedings into the calculus of whether an *existing* judgment affords a party all the relief she sought. No one disputes that a sentence-four judgment remanding for further proceedings represents at least a partial victory for the claimant. The question whether petitioner is aggrieved by that judgment, however, depends not on whether the judgment forever precludes petitioner

from obtaining disability benefits in future proceedings before the Commissioner, but whether petitioner "receives *all* that [she] has sought" from the district court itself. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980) (emphasis added). Petitioner may appeal the district court's final judgment as long as the court "den[ied] in part the remedy [she] requested," even if it "dispositively grant[ed] in part" a remedy that petitioner sought. *Jose*, 117 S. Ct. at 465.

Amicus does not dispute that, although the district court entered a judgment "remand[ing] to the [Commissioner] for further proceedings," J.A. 129, the district court did not grant petitioner's request for a "judgment * * * reversing the decision of the Commissioner * * * without remanding the cause for a rehearing." 42 U.S.C. 405(g) (fourth sentence). As such, petitioner was not a fully prevailing party before the district court, is aggrieved by the court's judgment, and has a right of appeal to seek to alter its terms.

a. Arguing to the contrary, amicus first reasons that because petitioner's complaint in the district court alternatively sought a remand for further proceedings and did not express a clear preference for an outright reversal for payment of benefits, "at least as a matter of pleading, [petitioner] got everything she asked for." Br. 14-15 & n.12. That argument lacks merit for a number of reasons.

First, amicus does not suggest that the result in this case would be any different had the claimant drafted her complaint in the manner amicus suggests. Neither the text of Section 405(g) nor the rules of procedure require a claimant to seek only a reversal without a remand for further proceedings, see Federal Rule of Civil Procedure 8(a), or to state in her

complaint the exceedingly obvious proposition that she would prefer an outright reversal and remand for payment of benefits rather than a remand for a rehearing by the Commissioner on the merits.[2]

Second, the authorities relied upon by amicus do not support the proposition that a party may not appeal a judgment that denies the party all of the relief that she sought. Indeed, the majority of the cases simply recognize the unremarkable principle that a party who obtains the *greater* of the requested alternative remedies may not complain that the court erred in not granting the *lesser* form of relief.[3]

---

[2] In *Faucher* v. *Secretary of Health and Human Services*, 17 F.3d 171 (6th Cir. 1994), which amicus cites with approval (Br. 19 n.15), the Secretary appealed a district court's decision that ordered an outright award of benefits under Section 405(g). Although the Secretary conceded that a judgment of reversal was appropriate because of errors in the administrative proceeding, the Secretary nonetheless appealed on the ground that the district court should have remanded for further proceedings before the agency. *Id.* at 173. Thus, the court of appeals implicitly understood that the Secretary was aggrieved by the district court's outright reversal, and thus had a right of appeal to seek a more favorable judgment of remand for further administrative proceedings. A claimant who is *denied* an outright reversal but *granted* a remand for rehearing is no less aggrieved.

[3] Thus, in *Southern Natural Gas Co.* v. *FERC*, 877 F.2d 1066, 1070-1071 (D.C. Cir. 1989), a party sought to challenge a decision of the Federal Energy Regulatory Commission (FERC) accepting a party's primary choice of a tariff but rejecting the party's secondary choice. In rejecting the appeal on the ground that the party was not "aggrieved" under the judicial review provisions of 15 U.S.C. 717r(b), the court explained that "having received from FERC what it presented as its first choice, * * * [the appellant] is not 'aggrieved' * * * by FERC's rejection of its second choice." Other cases relied upon by amicus are similarly inapposite. See *Star Fin. Servs., Inc.* v. *AASTAR Mortgage Corp.*, 89 F.3d 5, 12 (1st Cir. 1996) (when discovery dispute arose over unproduced documents, district court excluded the evidence instead of continuing the trial; on appeal, the court ruled on the merits that the party who had successfully excluded evidence in limine thereafter had waived its objection to the evidence by not objecting to its introduction at trial); *United States* v. *Ligori*, 658 F.2d 130, 134 (3d Cir. 1981) (per curiam) (Higginbotham, J. concurring) (party waived a right to a remand before a different judge when, per the party's request, the judge disregarded government's objection to a motion for reduction of sentence); *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976) (defendant's motion to disqualify plaintiff's counsel became moot when that defendant was dismissed from case).

In any event, the district court's remand order in this case did not grant in full the lesser and alternative relief of remand sought by petitioner. Petitioner sought a remand "for proper evaluation of the evidence or a hearing *de novo*," J.A. 37, based on her four contentions of administrative error. The district court, however, rejected three of those contentions, which relate to the ALJ's rejection of petitioner's testimony about her pain, the report of her treating physician, and whether that evidence was properly incorporated into the questions posed to the vocational expert. The remand order was based only on petitioner's fourth contention—that the Commissioner had not carried his burden of showing that there were significant numbers of jobs in the national economy that petitioner was able to perform, because the jobs the ALJ identified required a physical attribute (the ability to reach constantly or frequently) that petitioner did not have. Pet. App. 25. The district court's decision therefore effectively limits petitioner's rights on remand. See Gov't Br. 24-25. In

that respect as well, petitioner was aggrieved by the district court's judgment and has a right of appeal to seek a judgment that orders a broader rehearing on remand.

b. Amicus also argues (Br. 15) that petitioner is not aggrieved by a sentence-four remand order "[u]nless or until" petitioner is denied disability benefits on remand. In that event, however, petitioner would be most immediately aggrieved not by the district court's judgment, but rather by the new decision of the Commissioner, which petitioner then would have to challenge in a new civil action in district court under Section 405(g). See *Finkelstein*, 496 U.S. at 625; *Schaefer*, 509 U.S. at 299. That new action could again result in another sentence-four remand for further agency proceedings, which could again result in another agency denial of benefits, and so on.

At bottom, amicus contends (Br. 15-19, 26-29) that a claimant can never be aggrieved by a final sentence-four judgment of remand as long as that judgment leaves open the opportunity for the claimant to obtain disability benefits on remand, and the claimant can ultimately challenge the district court's adverse rulings in some later appeal. In amicus's view (*id.* at 18), the general rule that a partially prevailing party may appeal aspects of the district court's decision denying the party's requested relief (see Gov't Br. 19-21) is inapplicable when the adverse decision expressly contemplates further proceedings. That contention, however, reads out of Section 405(g) its fourth sentence, which expressly gives the district court the power to enter a judgment in favor of petitioner "without remanding the cause for a rehearing." Cf. *Melkonyan* v. *Sullivan*, 501 U.S. 89, 92 (1991) (a decision that a claimant is entitled to

disability benefits grants the claimant "all the relief he had initially requested"). Because the district court entered a judgment of reversal *with* a remand for a rehearing, petitioner was not a fully prevailing party in the district court. *Jose*, 117 S. Ct. at 465.[4]

Moreover, by arguing that petitioner is not aggrieved because the decision is not sufficiently conclusive with respect to her ultimate claim for benefits, amicus conflates an issue of finality with the question of aggrievement and ignores Section 405(g), which "directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order." *Finkelstein*, 496 U.S. at 629. The fact that a party might obtain benefits at a later date *notwithstanding* the adverse decision does not mean that the party is not immediately aggrieved by

---

[4] Amicus does not question the principle announced in *Jose* that a party may "gain access to appeal from the District Court's final decision to the extent that it disfavor[s]" that party. 117 S. Ct. at 465. Instead, amicus argues (Br. 25-26 & n.21) that *Jose* is distinguishable because the adverse notice requirement in *Jose* appeared on the face of the district court's order; the district court judgment in *Jose* placed a restriction on the appellant; and the Court's decision turned on ripeness, not standing, grounds. The order of remand for further proceedings in this case, however, appears on the face of both the district court's opinion and judgment. J.A. 128-129. Moreover, the district court's remand order fails to award petitioner the disability benefits to which petitioner believes she is entitled. Finally, the fact that *Jose* discussed the doctrine of ripeness does not change the fact that petitioner, like the IRS in *Jose*, was "[a]ggrieved" by a "final * * * decision dispositively granting in part and denying in part the remedy requested." 117 S. Ct. at 465.

that decision when it is entered.[5] Indeed, the possibility that petitioner may obtain an award of benefits upon remand (or upon subsequent judicial review in a new civil action following remand) does not provide petitioner with the disability benefits she would now be receiving if the district court had reversed the Commissioner's decision outright. Thus, because the district court's judgment *finally* disposed of petitioner's contentions and did so in a manner that did not afford petitioner *all* the relief she requested, she is entitled to a "statutory right to appeal" under 28 U.S.C. 1291. *Roper*, 445 U.S. at 333.[6]

---

[5] For instance, when a court of appeals certifies an interlocutory issue for appeal under 28 U.S.C. 1292(b), the court reviews the district court's decision for errors notwithstanding the fact that the challenged decision may expressly contemplate further proceedings in which the appellant may ultimately prevail on the merits. See, *e.g.*, *Chan* v. *Korean Air Lines Ltd.*, 490 U.S. 122, 124-125 (1989) (reviewing court of appeals' decision under 28 U.S.C. 1292(b) that affirmed district court's denial of summary judgment); *Ricke* v. *Armco, Inc.*, 92 F.3d 720, 721, 726 (8th Cir. 1996) (affirming denial of summary judgment); see generally 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3931 (2d ed. 1996); see also 28 U.S.C. 1292(a)(1) (courts of appeals have jurisdiction over interlocutory decisions granting or refusing injunctions).

[6] Amicus misses the thrust of our submission when he argues (Br. 18 n. 14, 24-25) that this case is distinguishable from *Roper*, *supra*, and *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939), in which the Court permitted an appellant to seek to correct procedural errors in the district court's order. Our point is not that the issue on appeal in this case is directly analogous to that at issue in either of those decisions, but rather that this case squarely fits within the normal rule that a party may appeal a final decision of a district court that denies all of the relief the party requested.

Parr v. *United States*, 351 U.S. 513 (1956), heavily relied upon by amicus throughout his brief, is not to the contrary. In *Parr*, the government obtained, over the defendant's objection, the dismissal without prejudice of an indictment in one venue after it had brought an identical second indictment in a different venue. *Id.* at 514-515. This Court affirmed the court of appeals' decision to dismiss the defendant's appeal. The Court initially reasoned that if the first indictment is "viewed in isolation * * *, an appeal from its dismissal will not lie because petitioner has not been aggrieved." *Id.* at 516. The Court alternatively concluded that if the two indictments are "viewed together as parts of a single prosecution," then an appeal would not lie because the dismissal of the first indictment "would not be a final order." *Id.* at 518. The Court explained that "[t]o hold this order 'final' at this stage of the prosecution would defeat the long-standing statutory policy against piecemeal appeals." *Id.* at 519.[7]

Unlike the situation presented in *Parr*, sentence eight of Section 405(g) provides that a judgment that includes a remand *is* a final, appealable order,[8] and

---

[7] See also *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54 (1989) ("finality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence"); cf. *United States* v. *MacDonald*, 435 U.S. 850 (1978) (denial of defendant's motion to dismiss indictment based on Sixth Amendment speedy trial violation is not a final, appealable order).

[8] Amicus repeatedly relies (Br. 16-17, 23 n.19, 35) on the portion of the opinion in *Parr* in which the Court concluded that, although a defendant must "hazard a trial * * * before he can get a review of whether he should have been tried," the "the discomfiture and cost of a prosecution for crime" are

sentence four authorizes the district court to grant the relief (outright reversal) requested by petitioner and denied by the district court. The defendant-appellant in *Parr* had not requested any relief from the district court, and the court's dismissal of the indictment was not a ruling on the merits of the indictment. Indeed, the Court in *Parr* distinguished civil cases in which defendants had been permitted to appeal from judgments of a plaintiff's nonsuit on the ground that "the defendant was asserting a right to a judgment in his favor on the merits, claimed to have

obligations of citizenship. See 351 U.S. at 519-520. That passage relates to the Court's holding that the dismissal of the first indictment was not a final, appealable order. Amicus makes the same mistake in arguing that petitioner is not aggrieved by the litigation costs of proceeding before the Commissioner on remand when he relies on decisions reiterating the general rule that the burden of future proceedings does not render a decision immediately appealable in the absence of a final judgment. See *Jefferson* v. *City of Tarrant*, 118 S. Ct. 481, 485-486 (1997) (state court decision was not a final judgment under 28 U.S.C. 1257(a)); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of petition for certiorari) ("This present petition * * * seeks our intervention before the litigation below has come to final judgment."); *Baker* v. *General Motors Corp.*, 86 F.3d 811, 816-817 (8th Cir. 1996), rev'd on other grounds, 118 S. Ct. 657 (1998) (reviewing after final judgment interlocutory discovery sanction). That principle has no relevance here, where Congress conclusively has determined that a sentence-four judgment that includes a remand order is a final judgment and is therefore subject to a statutory right of immediate appeal under 28 U.S.C. 1291. See *Finkelstein*, 496 U.S. at 628 ("[R]espondent does not contest the power of Congress to define a class of orders as 'final judgments' that by inference would be appealable under § 1291. This is what Congress has done in the fourth sentence of § 405(g).") (citation omitted).

been fully established prior to the nonsuit, and was obviously aggrieved by the loss of that judgment." 351 U.S. at 517 n.9.

The Court in *Parr* thus carefully distinguished the type of case presented here, in which a civil litigant sought but was partially denied a favorable judgment on the merits. This Court's distinction of such cases is entirely consistent with the principle that a plaintiff who obtains less than the requested judgment on the merits is aggrieved and has a right of appeal. See *Roper*, 445 U.S. at 333; *Jose*, 117 S. Ct. at 465. Accordingly, *Parr* does not support the court of appeals' dismissal of petitioner's appeal for lack of jurisdiction. Cf. 15A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3902, at 81-82 (2d ed. 1992) (discussing limited application of *Parr* to criminal proceedings).

Amicus again erroneously imports finality principles into the determination of aggrievement when he contends (Br. 17-18 & n.13) that the district court's decision in this case is analogous to an *agency* decision remanding for further proceedings within the agency.[9] We agree that judicial review of intra-agency remands generally would be premature. See generally 5 U.S.C. 704 (providing for judicial review

[9] See *CH2M Hill Central, Inc* v. *Herman*, 131 F.3d 1244, 1246-1247 (7th Cir. 1997) (holding that Occupational Safety and Health Review Commission's decision to remand to ALJ was not the sort of final agency decision under 29 U.S.C. 659(c) that aggrieved appellant under 29 U.S.C. 660(a)); accord *Stripe-A-Zone* v. *Occupational Safety & Health Review Comm'rs*, 643 F.2d 230, 233 (5th Cir. 1981); see also *Director, OWCP* v. *Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1988) (decision by Benefits Review Board remanding matter to ALJ is not a final order of the Board under 33 U.S.C. 921(c)).

of "final agency action"). Accordingly, we would agree that petitioner could not have challenged in district court the July 1993 decision by the Appeals Council to remand petitioner's claim for benefits to the ALJ for a second hearing, J.A. 47, because the first sentence of Section 405(g) requires a "final decision of the Commissioner." Here, however, petitioner challenges a final district court decision that partially denied her the relief that she requested. She is aggrieved by the judgment to that extent and may appeal it.[10]

3. Petitioner Does Not Merely Challenge Statements In The District Court's Opinion That Are Unnecessary To Its Judgment

Amicus further contends that petitioner's appeal violates the principle that appellate courts "review[]

[10] Amicus suggests (Br. 19 n.15, 34) that the judgment below can be supported on the ground that petitioner's chances of prevailing on appeal are slim. We agree that petitioner is not likely to obtain an outright reversal on appeal, because the Commissioner's decision was supported by substantial evidence, and because even if the ALJ was wrong on one or more of the issues raised by petitioner, the proper disposition in such circumstances, as a general rule, is to remand the cause to the Commissioner for further proceedings, as the district court did here with respect to the one issue on which it ruled against the Commissioner. See Gov't Br. 25 n.15, 28-29. Petitioner's appeal is not frivolous (see Pet. C.A. Br. 21-31), however, and the likelihood of her success on appeal therefore has no bearing on whether the court of appeals has jurisdiction to hear the merits of petitioner's contentions. *Steel Co.* v. *Citizens for Better Environment*, 118 S. Ct. 1003, 1010 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.").

judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam). According to amicus (Br. i, 19-24), petitioner's appeal does not challenge the judgment of remand by the district court, but seeks additional rulings in support of that same judgment. That contention is unsound for several reasons.

As an initial matter, petitioner has challenged the judgment entered by the district court, which "remanded [the case] to the Secretary *for further proceedings*." J.A. 129 (emphasis added); see also J.A. 128 (ordering that "this case be remanded to the [Commissioner] for further proceedings in accordance with this opinion"). Petitioner by her appeal seeks a different and more favorable judgment—an outright reversal and award of immediate benefits "without * * * a rehearing." 42 U.S.C. 405(g).[11] Petitioner's appeal nowhere requests the court of appeals to adopt the three contentions of administrative error on which the district court ruled against her as alternative grounds for affirming the judgment of remand that the district court actually entered. Rather, petitioner challenges the three legal rulings

[11] In contrast, amicus relies on decisions in which the appellant did not seek to alter the terms of the lower court's judgment. See, *e.g.*, *Rooney*, 483 U.S. at 311 (certiorari improvidently granted when judgment "was *entirely* in the State's favor") (emphasis added); *In re DES Litig.*, 7 F.3d 20, 23-25 (2d Cir. 1993) (party who had received dismissal with prejudice did not seek modification of judgment); *Allstate Ins. Co.* v. *A.A. McNamara & Sons, Inc.*, 1 F.3d 133, 137 (2d Cir. 1993) (party filing cross-appeal did not seek to "alter the judgment in any way"); see also *Owen-Illinois, Inc.* v. *Aetna Cas. & Sur. Co.*, 990 F.2d 865 (6th Cir. 1993) (dismissing cross-appeal asserting alternative grounds for affirming judgment).

of the district court because, in her view, if those rulings are reversed, the court of appeals should order an outright reversal and award of benefits.

Amicus similarly is wrong in suggesting (Br. 3, 5, 23-24) that petitioner's court of appeals brief is procedurally defective in requesting a reversal of the Commissioner's decision and an immediate award of benefits by the Commissioner (Pet. C.A. Br. 18, 21, 27-28, 35), instead of modification of the district court's judgment. At the outset of her court of appeals brief, petitioner could not have requested alteration of the district court's judgment more clearly:

> This is an appeal, in a Social Security disability case, from the *Judgment* of Robert E. Jones, U.S. District Judge, District of Oregon, vacating the agency's final decision that Forney was not disabled, but remanding to the agency for further proceedings. Forney appeals, and requests a finding of disability and payment of benefits, *instead of remand for additional proceedings.*

Id. at 2 (emphases added); see also Pet. i ("May a Social Security Disability claimant who in district court procures a final judgment with an accompanying order of remand for additional administrative proceedings * * * appeal * * * on the ground that broader relief (*e.g.*, an outright award of disability benefits) should have been granted by the district court, based on issues which the district court decided adversely to the claimant?") (emphasis omitted).[12]

[12] There is nothing surprising or jurisdictionally significant about the fact that petitioner drafted her appellate brief to emphasize that she wanted the Commissioner to award her benefits without the further administrative proceedings ordered by the district court. Although courts of appeals review judgments of the district court, which in turn review the decisions of the Commissioner, see *O'Connor* v. *Shalala*, 23 F.3d 1232, 1234 (7th Cir. 1994), it is the Commissioner who ultimately must make payments of disability benefits if ordered to do so by a court.

4. The Policy Considerations Advanced By Amicus Do Not Warrant An Implied Exception To The Statutory Right Of Appeal

Finally, amicus argues (Br. 31-34) that permitting appeals by claimants in petitioner's position would overburden the courts of appeals. Amicus does not contest (*id.* at 30, 34), however, that most claimants will forgo a statutory right to appeal and instead seek benefits on remand because that is the most efficient and effective means of obtaining benefits. See Gov't Br. 26-28. Although amicus notes the number of district court actions seeking judicial review of final agency decisions,[13] amicus offers no reason why any appreciable number of claimants who obtain an order of remand will perceive an immediate appeal to be sufficiently in their interest to warrant pursuing that course in lieu of immediate administrative proceedings. Moreover, amicus does not challenge our submission that, should the Court hold that claimants may appeal a sentence-four judgment of remand,

[13] We have been informed by the Social Security Administration that, out of the 9,462 cases decided by district courts in Fiscal Year 1996, 38% resulted in a remand for further proceedings under either the fourth or the sixth sentence of Section 405(g), and six percent resulted in an outright reversal without further rehearing. Since Fiscal Year 1987, district courts have entered remands for rehearing in 37%-43% of all cases filed, and have ordered outright reversals in 6%-19% of those cases.

principles of issue preclusion should not be rigidly applied to force claimants to seek immediate appeal (instead of otherwise returning to the agency) in order to preserve their objections to the district court's opinion and judgment. See Gov't Br. 32-34. In those circumstances, the practical consequences of permitting claimant appeals should be quite limited.[14]

In any event, the possibility that appeals might increase does not furnish a basis for excepting petitioner's appeal from the general rule under 28 U.S.C. 1291 that a party aggrieved by a final judgment of a district court has a "statutory right to appeal." *Roper*, 445 U.S. at 333; cf. *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992) (noting "federal courts are vested with a virtually unflagging obligation to exercise the jurisdiction given them") (internal quotation marks omitted). The policy concerns expressed by amicus are more appropriately directed to Congress, which is in "a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955); see also *Finkelstein*, 496 U.S. at 628 (noting Congress's power to "define a class of orders as 'final judgments' that by inference would be appealable under § 1291").

Amicus further contends (Br. 35) that an appeal here would undermine the government's institutional

---

[14] In 1994, the Tenth Circuit permitted a claimant to appeal a sentence-four remand order. *Nguyen* v. *Shalala*, 43 F.3d 1400, 1402 n.2. Yet insofar as we are aware, no other claimant in that Circuit has attempted to follow suit. See also Gov't Br. 27 n.16 (discussing paucity of claimant appeals).

interest in allowing the Commissioner to correct administrative errors. Once the Commissioner has completed his administrative proceedings and finally denied a claimant's application for disability benefits, however, the first and fourth sentences of Section 405(g) afford the claimant a statutory right to seek judicial review in district court, and the eighth sentence provides that the district court's final decision "shall be subject to review in the same manner as a judgment in other civil actions." It is unlikely that any given claimant will appeal a district court judgment that reverses the Commissioner's decision and remands for a rehearing on the merits. But even in those situations in which an appeal might be taken, the Commissioner perceives no undue interference with his duties to administer the Social Security program as envisioned by Congress, because the claimant's appeal necessarily would be directed to those aspects of the district court's decision that were *favorable* to the Commissioner, and thereby had already respected his institutional interest in administering the program.

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded for consideration of petitioner's appeal on the merits.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1998